IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CHELSEA KOENIG, on behalf of herself and all other similarly situated,	)	
Plaintiff,	)	Case No. 2:16-cv-01396-MAK
v.	)	
GRANITE CITY FOOD & BREWERY, LTD and DOE DEFENDANTS 1-10,	)	
Defendant.	)	

DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION FOR CONDITIONAL AND CLASS CERTIFICATION

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I. INTRODUCTION

This Court should deny Plaintiff Chelsea Koenig's ("Koenig") motions for conditional and class certification of her Fair Labor Standards Act ("FLSA")[1] and Pennsylvania Minimum Wage Act ("PMWA") claims in their entirety because (1) she points to no common evidence that has been or can be adduced that will shed light on the legality or illegality of Defendant's alleged conduct; (2) she fails to demonstrate all class members were subjected to a uniform unlawful practice or policy; (3) the evidence demonstrates her allegations are inconsistent with the experiences of other individuals in her proposed classes; (4) she has no knowledge of how other proposed class members were affected by the actions that she claims are unlawful; (5) she did not suffer a loss for many of the actions she claims are unlawful; and (6) her Pennsylvania specific claims fail as a matter of law. No form of a class or collective action is appropriate in this case.

II. FACTS

Defendant Granite City Food & Brewery, LTD ("Cadillac Ranch") operates restaurants under the name Cadillac Ranch. Cadillac Ranch is an "All-American Bar & Grill" with locations in Robinson, Pennsylvania; National Harbor, Maryland; Mall of America, Minnesota[2]; and Kendall, Florida. [Exhibit 1, at ¶5 Dean Dec.]. Cadillac Ranch also operates a "premier lounge" in Indianapolis, Indiana under the name Bartini's. [*Id.*]. Cadillac Ranch previously operated a restaurant in Annapolis, Maryland, however, that location closed in January 2014. [*Id.* at ¶ 6].

Each Cadillac Ranch location is managed by a general manager. [Exhibit 2, Dean 30(b)(6) Dep. at pp. 44:16-45:9]. Additionally, a front-of-house manager is responsible for the day-to-day operations of the bar and seating areas of the restaurant. [*Id.* at p. 72:12-73:1]. The front-of-house manager directly manages the Cadillac Ranch employees who interface with customers, including: bartenders, bar backs, servers, food runners and hosts. [*Id.*].

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[1] Koenig refers to her request that the Court facilitate notice of this lawsuit under FLSA §216(b) as seeking conditional or collective certification. For ease of reference, Cadillac Ranch will use the same terminology throughout its opposition.

[2] The Mall of America location is excluded from this lawsuit. [*See* ECF No. 56].

Koenig worked for Cadillac Ranch as a bartender **for only three months** - from May 12, 2014 through August 14, 2014 - **and only in Pennsylvania**.[3] [Exhibit 3, Koenig Dep. at pp. 27:1-9, 46:13-47:9 and Dep. Exhibit 10]. Cadillac Ranch took a tip credit in relation to her compensation and paid her $2.83 per hour, as permitted under 29 U.S.C. § 203(m) and 43 P.S. § 333.103.[4] [Exhibit 3, Koenig Dep. at pp. 42:18-44:7, 46:20-47:9 and Dep. Exhibits 9-10]. Koenig commenced this putative class and collective action on September 9, 2016, alleging a myriad of minimum wage violations, with a particular emphasis on Cadillac Ranch's utilization of a tip credit. [*See* ECF No. 1]. As of today, no former or current Cadillac Ranch employees have joined her in this lawsuit. [*See* ECF docket].

Koenig seeks to conditionally certify a FLSA collective action comprising:

> All persons who work or have worked for Granite City Food & Brewery, LTD. at any of its Cadillac Ranch restaurants located in Pennsylvania, Florida, Maryland, or Indiana as a "Tipped Employee" (such as server, bartender, busser, and/or food runner) at any time from September 9, 2013 to the date they executed a copy of the January 2017 Tip Credit Policy.

[ECF No. 57-1]. Koenig also seeks to certify a class action pursuant to FED. R. CIV. P. 23 for the following class:

> All current and former Tipped Employees who have worked for Defendant in the Commonwealth of Pennsylvania at any point after September 9, 2013 through the date they received a copy of the January 2017 Tip Credit Policy (the

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[3] Koenig was an experienced bartender when she began work at Cadillac Ranch, as she previously worked in a similar capacity for Primanti Brothers restaurant. [Exhibit 3, Koenig Dep. at pp. 28:25-29:5]. Koenig is pursuing a similar lawsuit against Primanti Brothers. [*Id.* at pp. 21:7-22:8].

[4] Koenig was paid the full minimum wage for all time spent in training. [Exhibit 3, Koenig Dep. at pp. 42:18-44:7, 46:20-47:9 and Dep. Exhibits 9-10].

"Pennsylvania Class").

[ECF No. 59, pp. 11-12]. Koenig claims that class and collective certification is proper because Cadillac Ranch (1) failed to properly inform its Tipped Employees of its intent to utilize a tip credit; (2) required its Tipped Employees to pay for customer walkouts and cash shortages through the tips they received (hereinafter referred to as "cash shortages"); and (3) required its Tipped Employees to purchase aprons and wine keys,[5] thus reducing their tips.[6] [*See generally* ECF Nos. 56, 59].

III. LEGAL STANDARDS

A. Conditional certification of Koenig's FLSA collective class.

Certification of an FLSA collective action is only appropriate if Koenig can demonstrate that she is "similarly situated" to the other individuals in her proposed class. *Bramble v. Wal-Mart Stores, Inc.*, Civ. A. No. 09-4932, 2011 WL 1389510, at *3-4 (E.D. Pa. Apr. 12, 2011). In order to be "similarly situated" to other Tipped Employees, Koenig must demonstrate a "factual nexus between the manner in which [Cadillac Ranch's] alleged policy affected her and the manner in which it affected other employees." *Symczyk v. Genesis HealthCare Corp.*, 656 F.3d 189, 193 (3d Cir. 2011) (rev'd on other grounds). Specifically, Koenig must make a "factual showing . . . that [she] and potential plaintiffs together were victims of a common policy or plan that violated the law." *Mike v. Safeco Ins. Co. of Am.*, 274 F.Supp.2d 216, 220 (D. Conn. 2003) (internal quotations omitted).

Koenig observes that some courts apply a "lenient" standard when considering a motion for conditional certification. [*See* ECF No. 56, at pp. 22-23]. Koenig, however, overlooks that the "lenient" standard is only appropriate when discovery has not progressed by the time the plaintiff's conditional certification motion is filed. *See Morisky v. Public Service Elec. & Gas Co.*, 111 F.Supp.2d 493, 497 (D.N.J. 2000); *Marcus v. Am. Contract Bridge League*, 254 F.R.D. 44, 47 (D. Conn. 2008). "[W]here, as here, discovery has commenced, and the parties submit deposition testimony, declarations, and other evidence in support of their respective positions … the more stringent test is appropriate" and "[m]ere allegations are not sufficient." *Bramble*, 2011 WL 1389510, at *4. The "more stringent test," simply requires the Court to examine the "**totality of the record available**" to "determine whether the plaintiff has met … her burden" of demonstrating a "factual nexus between the manner in which [Cadillac Ranch's] alleged policy affected her and the manner in which it affected other employees." *Gordon v. Maxim Healthcare Servs., Inc.*, Civ. Action No. 13-7175, 2014 WL 7008469, at *2 (E.D. Pa. Dec. 11, 2014) (emphasis added); *Symczyk*, 656 F.3d at 193.

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[5] A wine key is a corkscrew used to open wine bottles. [Exhibit 1, at ¶17 Dean Dec.].

[6] It is unclear whether Koenig argues that her cash shortage and apron and wine key claims provide a basis for conditional certification of her FLSA claims. However, because she addresses the claims in her brief, Cadillac Ranch responds to these arguments below.

In short, regardless of the label "stringent" or "lenient," the Court should look at all evidenced uncovered during discovery when deciding these Motions. Indeed, Koenig propounded thirty requests for admission, seventy-two requests for production of documents, and fifteen interrogatories. [Exhibit 4]. Koenig also took a FED. R. CIV. P. 30(b)(6) deposition, which covered thirty-five topics. [Exhibit 2, Dean 30(b)(6) Dep. at pp. 18:24-19:6 and Dep. Exhibit 1]. Substantial discovery occurred in this case and all of it should be considered.

B. FED. R. CIV. P. 23 class action certification of Koenig's PMWA claims.

"The class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 348 (2011). In deciding whether to certify a class under Rule 23, this Court must undertake a "rigorous analysis" to determine whether Koenig can satisfy each of the four requirements of Rule 23(a) and at least one requirement of Rule 23(b). *In re Hydrogen Peroxide Antitrust*

Litigation, 552 F.3d 305, 309 (3d Cir. 2008).

To satisfy Rule 23(a), Koenig must establish: (1) the class is sufficiently numerous; (2) there are common questions of law or fact; (3) her claims are typical of those in the class; and (4) she can adequately protect the interests of the class. *Barnes v. American Tobacco Co.*, 161 F.3d 127, 140 (3d Cir. 1998); *Dukes*, 131 S. Ct. at 2551-52 (plaintiff "must affirmatively demonstrate his compliance" with Rule 23).

"The commonality and typicality requirements of Rule 23(a) tend to merge." *Dukes*, 564 U.S. at 373, n.5. The "commonality" and "typicality" elements "serve as guideposts for determining whether . . . the named plaintiff's claims and the class claims are so inter-related that the interests of the class members will be fairly and adequately protected in their absence." *DeRosa v. Massachusetts Bay Commuter Rail Co.*, 694 F.Supp.2d 87, 100 (D. Mass. 2010) (quoting *Gen. Tel. Co. of Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982)). Commonality "requires the plaintiff to demonstrate that the class members have suffered the same injury"—not merely a violation of the same law. *Dukes*, 131 S. Ct. at 2551. The claims of a proposed class must "depend upon a common contention" which "must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* ("What matters to class certification . . . is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers"). Further, commonality does not exist and class certification is improper if adjudication of the individual class members will require "mini trial[s]." *See Windham v. Am Brands, Inc.*, 565 F.2d 59, 70 (4th Cir. 1977).

Rule 23(b)(3) requires Koenig to demonstrate that "questions of law or fact common to class members predominate over any questions affecting only individual members." In order to satisfy the predominance requirement, Koenig must establish that the "issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole . . . predominate over issues that are subject only to individualized proof." *Ritti v. U-Haul Int'l*, Civ. A. No. 05-4182, 2006 WL 1117878, at *8 (E.D. Pa. Apr. 26, 2006). "[T]he question of predominance imposes . . . a stringent obligation on the reviewing court to ensure that issues common to the class truly overshadow those pertinent to individuals or to subgroups of class members." *De Lage Landen Fin. Servs., Inc. v. Rosa Floors, LP,* 269 F.R.D. 445, 463 (E.D. Pa. 2010). "If proof of the essential elements of the cause of action requires individual treatment, then class certification is inappropriate." *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 259 F.3d 154, 172 (3d Cir. 2001).

IV. ARGUMENT

A. Koenig's tip credit notification, cash shortages, and apron and wine key claims are inappropriate for class or conditional certification.

1. Cadillac Ranch's policies comply with the law and thus certification will require the Court to analyze individual manager communications.

"Under the FLSA, an employer is permitted to pay tipped employees at an hourly rate below the minimum wage if the employees' wages and tips, added together, meet or exceed the minimum wage proscribed in the statute." *Rong Chen v. Century Buffet & Rest.*, Civ. Action No. 09-1687, 2012 WL 113539, at *5 (D.N.J. Jan. 12, 2012). "However, before an employer can take advantage of this tip credit provision, it must inform the employee of the statutory requirements related to the credit tip **and** allow the employee to keep all tips received, with an exception made for the pooling of tips among employees who regularly receive tips." *Id.* (emphasis in original). "Essentially, an employer must inform its employees that it intends to treat tips as satisfying part of the employer's minimum wage obligations." *Pellon v. Bus. Representation Int'l*, 528 F.Supp.2d 1306, 1310 (S.D. Fla. 2007).

Federal law, regulations, and the U.S. Department of Labor ("DOL"), Wage and Hour Division, state that prior to utilizing a tip credit, an employer must notify a tipped employee of the following information:

1) the amount of cash wage the employer is paying a tipped employee, which must be at least $2.13 per hour;

2) the additional amount claimed by the employer as a tip credit, which cannot exceed $5.12 (the difference between the minimum required cash wage of $2.13 and the current minimum wage of $7.25);

3) that the tip credit claimed by the employer cannot exceed the amount of tips actually received by the tipped employee;

4) that all tips received by the tipped employee are to be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

5) that the tip credit will not apply to any tipped employee unless the employee has been informed of these tip credit provisions.

[29 U.S.C. § 203(m); 29 C.F.R. § 531.59; Exhibit 5, DOL Fact Sheet #15]. "The employer may provide **oral or written notice** to its tipped employees informing them of items 1-5 above." [*Id.* (emphasis added)]. Pennsylvania law contains similar tip notification and retention requirements. *See* 43 P.S. § 333.103(d).

Cadillac Ranch's tip credit notification policies and procedures, at all times, have included both written and oral notice to Tipped Employees. Indeed, Cadillac Ranch provides tip credit notice to its Tipped Employees through it policies, procedures, FLSA and state law posters, and through oral notification from location management. Specifically, Cadillac Ranch provides notice of Fact Sheet #15's requirements as set forth below:

1) Tipped Employees are informed of the cash wage they receive through oral

representations from location management at the commencement of their employment, their payroll records (stubs) and FLSA and state law posters, which are displayed on the premises. *See* [Exhibit 2, Dean 30(b)(6) Dep. at pp. 171:15-173:11 (noting that Cadillac Ranch expects its managers to inform new Tipped Employees of its tip credit policies during new hire training), Dean 30(b)(6) Dep. at 230:6-232:4 and Dep. Exhibit 33 at pp. 7-9; Exhibit 6, ¶¶ 5-10 Wazik Dec.]; *Pellon*, 528 F.Supp.2d at 1310-11 ("a prominently displayed poster using language approved by the Department of Labor to explain 29 U.S.C. § 203(m) is sufficient notice" and "paychecks informed them of their salary twice a month"); [Exhibit 6, ¶10 Wazik Dec. (photos of the wage and hour posters displayed at the Robinson, Pennsylvania Cadillac Ranch location relevant to this lawsuit]. Additionally, the Support Manual states that Tipped Employees "will be paid the State/Tipped Cash minimum wage." [Exhibit 2, Dean 30(b)(6) Dep. at p. 159:16-21 and Dep. Exhibit 18 at CR – Koenig 88].

2) Tipped Employees are informed of the tip credit utilized by Cadillac Ranch through oral representations from location management at the commencement of their employment. *See* [Exhibit 2, Dean 30(b)(6) Dep. at pp. 171:15-173:11 (noting that Cadillac Ranch expects its managers to inform new Tipped Employees of its tip credit policies during new hire training), Dean 30(b)(6) Dep. at 230:6-232:4 and Dep. Exhibit 33 at pp. 7-9; Exhibit 6, ¶¶ 5-10 Wazik Dec.].

3) Tipped Employees are informed that the "Tipped Employee must actually receive at least as much in tips as the credit taken by" Cadillac Ranch through the Cadillac Ranch's Support Manual. [Exhibit 2, Dean 30(b)(6) Dep. at p. 159:16-21 and Dep. Exhibit 18 at CR – Koenig 90, Dean 30(b)(6) Dep. at 230:6-232:4 and Dep. Exhibit 33 at pp. 7-9].

4) Tipped Employees are informed "[a]ll tips received by the Employee must be kept by the Employee" except a valid tip pool through Cadillac Ranch's Support Manual. [*Id.*].

5) Tipped Employees are informed that they "must be informed about the Tip Credit provisions of the law before the credit is taken" through Cadillac Ranch's Support Manual. [*Id.*].

Cadillac Ranch's reliance, in part, upon oral representations from location management to communicate the above information is lawful. Indeed, DOL Fact Sheet #15 explicitly permits "**oral or written**" tip credit notification. [Exhibit 5, DOL Fact Sheet #15 (emphasis added)].

In addition to the form of notice outlined above, on or around April 2016, Cadillac Ranch promulgated its Tip Credit Policy, which sets forth:

1) The cash wage rate applicable to Tipped Employees based on the state in which they are employed;

2) The tip credit amount utilized by Cadillac Ranch based on the state in which the Tipped Employees are employed;

3) A notification that in no circumstance may the amount of the tip credit claimed by Cadillac Ranch exceed the value of tips actually received; and

4) A notification that all tips are to be retained by the employee.

[Exhibit 2, Dean 30(b)(6) Dep. at pp. 175:14-178:17 and Dep. Exhibit 24 at CR – Koenig 124; Exhibit 1, at ¶20 Dean Dec.]. On or around December 2016, the Tip Credit Policy was revised and updated with information and compensation rates current for October 2016. [Exhibit 1, at ¶22 Dean Dec.]. Finally on or around January 2017, the Tip Credit Policy was again revised and updated with information and compensation rates current for January 2017.[7] [Exhibit 2, Dean 30(b)(6) Dep. at pp. 175:14-178:17 and Ex. 24 at CR – Koenig 303; Exhibit 1, at ¶24 Dean Dec.]. Therefore, at all times during Koenig's proposed class periods, the manner in which Cadillac Ranch notified Tipped Employees about its use of the tip credit complied with the law.

Because Cadillac Ranch's policies related to the manner in which it communicates tip credit information to its employees complies with the law, Koenig's tip credit notice claim is really focused on the quality or content of the communications about the tip credit, which requires an individualized assessment to determine notwithstanding Cadillac Ranch's policies for communicating information about the tip credit, what did individual employees actually learn about the tip credit. Consequently, Koenig's class and collective action claims will rise and fall on individualized determinations about the quality of the conversations individual employees had with individual managers and whether those individual managers properly provided the required information. None of these determinations can be made through common proof and, therefore, a class or collective action is not appropriate.

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[7] Starting on or around April 2016, Cadillac Ranch requires all new hires to electronically acknowledge the Tip Credit Policy. [Exhibit 1, at ¶¶ 21, 23, and 25 Dean Dec.]. Further, all existing Tipped Employees are shown the Tip Credit Policy, on multiple occasions, upon logging into Cadillac Ranch's ALOHA timekeeping system and Hot Schedules. [*Id.*].

With respect to Cadillac Ranch's policy regarding cash shortages, Koenig claims that because "nothing is provided to [Tipped Employees] that advises them that they are not responsible for customer walk-outs," the Company's policy must require Tipped Employees to pay for cash shortages. [ECF No. 59, at p. 31]. Koenig's argument misses the mark. Indeed, it is contradicted by the plain language of Cadillac Ranch's policy which states that "**tips are the property of the employee** and an employer cannot require an employee to turn over any portion of them to the restaurant … this includes for reasons such as: **walk-outs, broken dishes, cash shortages, uniforms, etc.**" [Exhibit 2, Dean 30(b)(6) Dep. at pp. 187:16-20, 193:9-194:19 and Dep. Exhibit 25 at CR – Koenig 724 (emphasis in original); *see also* Exhibit 2, Dean 30(b)(6) Dep. at p. 175:14-17 and Dep. Exhibit 23 at CR-Koenig 120 ("Any tip or gratuity received by a Staff Member is the sole property of the Staff Member"); Exhibit 1, at ¶¶ 10-14 Dean Dec.; Exhibit 6, at ¶¶ 11-14 Wasik Dec.]. Therefore, Cadillac Ranch's cash shortage policy does not require Tipped Employees to pay for the shortages and the policy is lawful.

To the extent Koenig claims individual managers required Tipped Employees to pay for cash shortages in contravention of Cadillac Ranch's policy, as with the oral tip credit notification communications, the determination of individual manager actions is necessarily individualized. *See MacGregor v. Farmers Ins. Exch.,* Civ. A. No. 10-03088, 2011 WL 2981466, at *3 (D.S.C. July 22, 2011) ("When alleged FLSA violations stem from the enforcement decisions of individual supervisors, without a company-wide policy or plan directing those enforcement decisions, collective treatment is not appropriate"); *Guillen v. Marshalls of MA, Inc.*, 841 F.

Supp.2d 797, 803 (S.D.N.Y. 2012) (denying conditional certification where employer implemented a lawful policy and plaintiffs only alleged enforcement issues).

Finally, Koenig blatantly mischaracterizes Cadillac Ranch's testimony and policy concerning aprons and wine keys by arguing that Tipped Employees are required to purchase these items. [ECF No. 59, at p. 32]. Cadillac Ranch's Support Manual provides "[o]ne apron is provided to you upon hire … [i]t is **recommended** that you purchase several aprons. [Exhibit 2, Dean 30(b)(6) Dep. at p. 159:16-21 and Dep. Exhibit 18 at CR – Koenig 111 (emphasis added)]. Thus, the plain language of the policy demonstrates that purchasing additional aprons is "recommended," and not required as Koenig argues. Further, Cadillac Ranch offers to have a third-party company clean its Tipped Employees' aprons at no cost. [Exhibit 2, Dean 30(b)(6) Dep. at pp. 168:19-169:2; Exhibit 1, at ¶¶ 15-16 Dean Dec.]. Similarly, while Cadillac Ranch's Support Manual provides that a Tipped Employee must have a "wine key" while on duty, nothing in the document indicates that the Employee must purchase the item. [*See* Exhibit 2, Dean 30(b)(6) Dep. at p. 159:16-21 and Dep. Exhibit 18 at CR – Koenig 110]. Instead, wine keys are available at the restaurant and are routinely provided to Tipped Employees by third-party wine vendors and are readily available behind the bar. [Exhibit 2, Dean 30(b)(6) Dep. at pp. 169:11-170:7; Exhibit 1, at ¶¶ 17-19 Dean Dec.; Exhibit 6, at ¶¶ 17-18 Wasik Dec.]. Therefore, Cadillac Ranch's apron and wine key policies do not require Tipped Employees to purchase products and reduce their tips. Thus, the policies are lawful.

2. Koenig's claims are not subject to common proof because they are inconsistent with the experiences of other Tipped Employees.

As noted above, in order to establish a basis for class and collective certification, Koenig must establish a "factual nexus" between her injuries and the injuries that she claims have affected the proposed class, *i.e.* that all class members suffered the "same injury." *Dukes*, 131 S.

Ct. at 2551; *Symczyk,* 656 F.3d at 193. At the outset, Koenig's argument that her tip credit notification claim is subject to common proof is contradicted by the DOL, which notes that an analysis of whether an employer complies with its tip credit notification requirements is determined on an employee-by-employee basis. *See* U.S. Department of Labor, Field Operations Handbook, 30d00(e)(1) ("[t]ip provisions apply on an individual employee basis"). Koenig attempts to defeat the DOL's guidance by arguing that certification is appropriate because Cadillac Ranch's employee handbook does not satisfy the tip credit notification requirements and asserts that "Defendant did not treat one Tipped Employee differently from another in terms of failing to properly notify them of their utilization of a tip credit." [ECF No. 59, at p. 20]. As detailed above, Koenig ignores that Cadillac Ranch's communication about the tip credit was effectuated through both oral and written communications. Cadillac Ranch has never asserted that it relied exclusively on its handbook to communicate about the tip credit. In addition to Koenig's arguments being factually and legally incorrect, her arguments (and claims) are inconsistent with the experiences of others in her proposed classes, who state:

> Tipped Employee declarations from National Harbor concerning tip credit notification:
>
> When I was hired Kristin Wirtz, our hiring manager, explained to me how I would be paid. I was advised that I would be paid on an hourly basis using the tip credit rate. More specifically, I was told that I would be paid $3.63 per hour as a cash wage and the company would take a tip credit. I was informed that I would receive tips from customers so that my total hourly wage, when my hourly pay and declared tips are combined, will equal or exceed the minimum wage. I was informed that if I did not earn minimum wage after my hourly cash pay and declared tips were combined, Cadillac Ranch would make up the difference via a payroll payment to me. … Kristin Wirtz explained my compensation using Cadillac Ranch's tip credit policy.
> [Exhibit 7, at ¶¶ 9-10, Courtney Aceto Declaration].
>
> * * *
>
> When I was hired Robin Posey [a manager] explained to me how I would be paid. I was advised that I would be paid on an hourly basis using the tip credit rate. More specifically, I was told that I would be paid $3.63 per hour as a cash wage and the company would take a tip credit, as stated in the employee handbook. I

was informed that if I did not earn minimum wage after my hourly cash pay and declared tips were combined, Granite City would make up the difference via a payroll payment to me.
[Exhibit 8, at ¶ 9, Stacey Parker Declaration]

* * *

When I was hired [my manager] explained to me how I would be paid. I was informed that if I did not earn minimum wage after my hourly cash pay and declared tips were combined, [Cadillac Ranch] would make up the difference via a payroll payment to me. In addition, I was informed that the tip credit claimed by [Cadillac Ranch] cannot exceed the amount of tips I actually received and that all tips I received are to be retained by me, except to the extend I participated in my restaurant's tip share with other tipped employees. … When I would review my pay statements, I was able to confirm the cash pay rate and the amount of tips I declared.
[Exhibit 9, ¶¶ 9-11, Christian DeSeve Declaration].

* * *

When I was hired a manager explained to me how I would be paid. I was informed that I would receive tips from customers so that my total hourly wage, when my hourly pay and declared tips are combined, will equal or exceed the minimum wage. When I would review my pay statements, I am able to confirm the cash pay rate and the amount of tips I declared.
[Exhibit 10, at ¶¶ 9-10, Jeff Honrade Declaration].

Tipped Employee declarations from Kendall concerning tip credit notification:

When I was hired, the previous General Manager Nicole Kamel explained to be how I would be paid. I was informed that I would receive tips from customers so that my total hourly wage, when my hourly pay and declared tips are combined, will equal or exceed the minimum wage. I was informed that if I did not earn minimum wage after my hourly cash pay and declared tips were combined, [Cadillac Ranch] would make the difference via a payroll payment to me. In addition, I was informed that the tip credit claimed by [Cadillac Ranch] cannot exceed the amount of tips I actually received and that all tips I received are to be retained by me.
[Exhibit 11, at ¶¶ 9-10, Isabel Rodriguez Declaration].

* * *

When I was hired, General Manager Rich Travis explained to me how I would be paid. I was informed that I would receive tips from customers so that my total hourly wage, when my hourly pay and declared tips are combined, will equal or exceed the minimum wage. In addition, I was informed that all tips I received are to be retained by me.
[Exhibit 12, at ¶¶ 9-10, Damari Rubio Declaration]; [*see also* Exhibit 13, at ¶¶ 9-10, Dylan Espinoza Declaration; Exhibit 14, at ¶¶ 9-10, Jason Alonso Declaration].

Tipped Employee declarations from Bartini concerning tip credit notification:

> When I was hired Nick Lake and the former assistant manager explained to me how I would be paid. I was advised that I would be paid on an hourly basis using the tip credit rate. More specifically, I was told that I would be paid $2.13 per hour. I was informed that I would receive tips from customers so that my total hourly wage, when my hourly pay and declared tips are combined, will equal or exceed the minimum wage. I was informed that if a did not earn minimum wage after my hourly cash pay and declared tips were combined, [Cadillac Ranch] would make up the difference via a payroll payment to me. During my employment, if I did not make enough in tips to meet the minimum wage [Cadillac Ranch] would adjust my pay rate to ensure that I made at least the minimum wage.
> [Exhibit 15, at ¶¶ 9-10, McKenzie Chenowith Declaration].
>
> * * *
>
> Throughout my employment with [Cadillac Ranch], I was informed that I would receive tips from customers so that my total hourly wage, when my hourly pay and declared tips are combined, will equal or exceed the minimum wage. I was informed that if I did not earn minimum wage after my hourly cash pay and declared tips were combined, [Cadillac Ranch] would make up the difference via a payroll payment to me.
> [Exhibit 16, at ¶ 9, Holly Stuckey Declaration].
>
> * * *
>
> When I was hired Nick Lake explained to me how I would be paid. I was advised that I would be paid on an hourly basis using the tip credit rate. More specifically, I was told that I would be paid $2.13 per hour as a cash wage and the company would take a tip credit. I was informed that I would receive tips from customers so that my total hourly wage, when my hourly pay and declared tips are combined, will equal or exceed the minimum wage. I was informed that if a did not earn minimum wage after my hourly cash pay and declared tips were combined, [Cadillac Ranch]would make up the difference via a payroll payment to me.
> [Exhibit 17, at ¶ 9, Courtney Smith Declaration].

The vast discrepancies between Koenig's allegations concerning Cadillac Ranch's tip credit notification and the experiences of other Tipped Employees demonstrates that the Court will need to engage in an "employee-by-employee" analysis to determine which proposed class members received proper notice.[8] *See Morisky,* 111 F.Supp.2d at 499. For instance, many of the declarations demonstrate that the Tipped Employees were orally informed of their cash wage and the tip credit utilized by Cadillac Ranch. However, some declarations are less clear and state "[w]hen I was hired, [a manager] explained to me how I would be paid." [Exhibit 12, at ¶¶ 9-10, Damari Rubio Declaration]. As such, Koenig's tip credit notification claims are not subject to class wide, common proof.

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[8] Cadillac Ranch did not obtain testimony from putative class members in Pennsylvania because such interviews are disfavored under Pennsylvania law. *See Dondore v. NGK Metals Corp.*, 152 F. Supp. 2d 662 (E.D. Pa. 2001). Cadillac Ranch has no reason to believe, however,

Koenig's cash shortage allegations are likewise inconsistent with the experiences of other Tipped Employees, who uniformly declared that they were not responsible for shortages. [*See* Exhibit 7, Aceto at ¶16 ("I have not been asked or required to pay for customer walkouts from my tips or my pay"); Exhibit 8, Parker at ¶14 (same); Exhibit 9, DeSeve at ¶14 (same); Exhibit 11, Rodriguez at ¶ 18 ("I have never had to pay for a customer walkout or cash register shortage out of my tips or a tip pool"); Exhibit 12, Rubio at ¶ 17 (same); Exhibit 13, Espinoza at ¶ 16 (same); Exhibit 14, Alonso at ¶ 16 (same); Exhibit 15, Chenowith at ¶ 17 (same); Exhibit 16, Stuckey at ¶ 19 (same).

Finally, Koenig's apron and wine key allegations are also inconsistent with the experiences of other Tipped Employees because she cannot point to any employee who actually suffered this alleged harm. [*See* ECF No. 59, at p. 32 and ECF No. 56, at pp. 18-19 (failing to cite to record evidence of an employee experiencing a minimum wage violation)]. Further, if a Tipped Employee did suffer a loss, such a claim would require an individualized analysis because the loss would be atypical of other employees.[9] [*See* Exhibit 6, at ¶¶ 17, 19 Wasik Dec. ("I am not aware of any Tipped Employee, including Chelsea Koenig, purchasing an additional

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that testimony from employees in Pennsylvania would differ from the testimony of employees working at other Cadillac Ranch restaurants as demonstrated above.

[9] In relation to Koenig's wine key argument, an individualized analysis would also be required to determine if the Tipped Employee actually purchased a wine key from a third-party source.

apron. … I am not aware of any Tipped Employee, including Chelsea Koenig, purchasing a wine key for their use at Cadillac Ranch”).

3. Class and conditional certification is inappropriate because Koenig has no knowledge concerning how other Tipped Employees received tip credit notice or whether others were forced to pay for cash shortages.

In order to warrant class or conditional certification, a plaintiff most demonstrate more than their personal experiences to show that others were subject to the same policies and conditions. *See Shala v. Dimora Ristorante, Inc.*, Civ. No. 2:16-03064, 2016 WL 7386954 (D. N.J. Dec. 21, 2016); *Farrow v. Ammari of Louisiana, Ltd.*, Civ. Action No. 15-7148, 2016 WL 3020901 (E.D. La. May 25, 2016). Therefore, courts refuse to certify classes where the named plaintiff lacks knowledge concerning how other employees were treated. *See Id.*

At her deposition, Koenig testified as follows concerning her knowledge of how other Tipped Employees receive tip credit notice from Cadillac Ranch:

Q. Do you know how other bartenders were informed of how they'd be paid in the tip credit?
A. I do not know.
Q. How about waiters and waitresses? Do you know how they would have been notified of the tip credit?
A. No.
Q. Barbacks and bussers, do you know how they would have been notified of the tip credit?
A. No.
Q. How about food runners? Do you know how they would have been notified of tip credit?
A. No.

* * *

Q. Do you know how they provide tipped employees with notice of a tip credit in the Miami location?
A. I do not.

* * *

Q. Do you know how the local management would provide notice of tip credit to its tipped employees at the National Harbor location?
A. I do not.

* * *

Q. Do you know how [Indianapolis management at Bartini] provided notice of tip credit to the tipped employees including like the waiters, waitresses, bartenders, food runners and bussers and barbacks?
A. **No.**
Q. How it would notify them of tip credit?
A. **No.**
Q. So you don't know how anything is done at the other locations other than your experience at the Pittsburgh location?
A. **That's correct.**

[Exhibit 3, Koenig Dep. at pp. 67:20-71:1 and Dep. Exhibits 11-12]. Similarly, Koenig provided the following testimony concerning other Pennsylvania Tipped Employees experiencing cash shortages:

Q. Are you aware of [cash shortages] happening to other bartenders outside of the times it happened to you?
A. **I'm not sure.**

* * *

Q. Do you know if there is a similar process with respect to the wait staff as far as covering walk-outs?
A. **I'm not sure.**
Q. You don't know?
A. **(Indicates no.)**

[Exhibit 3, Koenig Dep. at pp. 111:18-113:14]. Lastly, Koenig also had no knowledge of the experiences of Tipped Employees of other Cadillac Ranch locations with respect to cash shortages:

Q. Do you know if this happens at any of the other Cadillac Ranch locations?
A. **I'm not sure.**
Q. You have no knowledge of what's done there?
A. **Correct.**
Q. Just to wrap up the other locations, you have no firsthand knowledge or experience with any of the other Cadillac Ranch locations?
A. **Correct.**

[*Id.*].

Koenig's lack of knowledge concerning how other Tipped Employees were impacted by her alleged claims is analogous to *Shala*, 2016 WL 7386954, where the court denied conditional certification because the plaintiff did "not state how he knows that none of the Tipped Workers received notice, whether oral or written of Dimora's intention to take a tip credit towards their wages." *Id.* at *3. The court reasoned that absent the plaintiff setting forth evidence that other proposed class members were treated the same, the plaintiff "is asking this Court to speculate … that other workers are similarly situated to him." *Id.*; *see also Ammari of Louisiana*, 2016 WL 3020901, at *3 (denying conditional certification where plaintiff's evidence was "purely personal" and did not set forth evidence concerning how the allegations impacted other employees). Like the plaintiff in *Dimora Ristorante*, Koenig's only knowledge concerning tip credit notice and cash shortages are her own personal experiences based on a mere three months of employment. Koenig has no knowledge of how **any other** Tipped Employees were allegedly wronged.

Koenig has no knowledge **at all** concerning tip credit notification and cash shortages at any Cadillac Ranch locations outside of Robinson, Pennsylvania. *See Trinidad v. Pret A Manager (USA) Ltd.*, 962 F.Supp.2d 545, 557-58 (S.D. N.Y. 2013) (denying conditional certification at locations other than the location where the plaintiff worked because she failed to demonstrate that employees at other locations suffered from the same alleged wrongs); *Bernard v. Household Intern., Inc.*, 231 F.Supp.2d 433, 435 (E.D. Va. 2002) (denying conditional certification for a nationwide proposed class because "[p]laintiffs in the instant case fail to make such a showing as to potential plaintiffs in defendant's offices outside of Virginia"). Further, Koenig has no knowledge **at all** concerning how tip credit notification and cash shortages impact servers, busser and food runners.[10] *See Bittencourt v. Ferrara Bakery & Cafe Inc.*, 310 F.R.D.

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[10] At her deposition, Koenig conceded that cash shortages would not impact bussers and food runners. [Exhibit 3, Koenig Dep. at p. 113:2-5]; *see Goldstein v. Children's Hosp. of Philadelphia*, Civ. A. No. 10-1190, 2013 WL 664174, at *6 (E.D. Pa. Feb. 25, 2013) (plaintiff

106, 115-16 (S.D. N.Y. 2015) (holding that "plaintiff's allegations about other classes of employees are insufficiently detailed to merit conditional certification" because she "provides little information about" the positions "beyond identifying them as potential class members"). As such, certification is inappropriate.

4. Class and conditional certification is inappropriate concerning Koenig's apron and wine key claims because she did not suffer this alleged harm.

"A plaintiff who has not sustained damages does not possess the same interest in a case, or the same incentive to prosecute a case, that one who has been harmed would possess." *Opiela v. Bruck*, 139 F.R.D. 257, 261 (D. Mass. 1990). Therefore, a named plaintiff who represents a class "must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and purport to represent." *In re Packaged Ice Antitrust Litig.*, 779 F.Supp.2d 642, 657-58 (E.D. Mich. 2011) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)); *see also Opiela*, 139 F.R.D. at 261. Here, Koenig does not allege that she suffered a loss as a result of her apron and wine key claims. [ECF No. 59, at 32]; [*see also* Exhibit 6, at ¶¶ 17, 19 Wasik Dec. (noting that management is unaware of Koenig purchasing an apron or wine key)]. Instead, Koenig merely alleges the claim. Her argument, absent an allegation of personal harm, is insufficient to certify a class on the issue.

B. Koenig's additional FED. R. CIV. P. 23 claims are inappropriate for class certification.

1. Koenig's argument that Tipped Employees are owed the minimum wage for all hours for which they do not receive tips fails as a matter of law and is unsupported by any evidence.

Koenig argues that 34 Pa. Code § 231.34 requires Cadillac Ranch to pay Tipped Employees the straight minimum wage for hours in which they do not receive tips. [*See* ECF No. 59 at p. 30]. Koenig's argument is contradicted by the plain language of 34 Pa. Code

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not similarly situated to individuals subject to different policies).

§ 231.34, which states "[h]ours worked each workday **in any occupation in which the tipped employee** does not receive tips." 34 Pa. Code § 231.34(4) (emphasis added). Thus, if an employee is working in two distinct occupations, one of which is tip eligible and one of which is not, the employee is entitled to straight minimum wage for the hours worked in the non-tipped position.[11] Further, *Zellagui v. MCD Pizza, Inc.*, 59 F.Supp.3d 712 (E.D. Pa. 2014), a case that Koenig cites in support of her argument, is inapposite. In *MCD Pizza*, a default judgment case, the plaintiff worked as both a delivery driver (a tipped position) and spent four hours every shift in the pizza shop performing basic maintenance tasks. *Id.* at 714. Thus, the court determined the plaintiff was owed straight minimum wage for the time he spent performing the maintenance work because it was a non-tipped "occupation." *Id.* at 715. Here, there is no evidence that Tipped Employees are performing in multiple "occupations" for Cadillac Ranch. Thus, the claim is inappropriate for class action treatment.

2. Koenig's argument that Tipped Employees' wages must be calculated on an "hourly" basis fails as a matter of law.

Koenig argues that 43 P.S. § 333.103(d) requires an employer to calculate a Tipped Employee's wage on an "hourly" as opposed to weekly basis. [*See* ECF No. 59, at pp. 30-31]. Koenig's argument is incorrect as a matter of law. First, there is no support in 43 P.S. § 333.103(d) for Koenig's argument. The statute is silent on this issue. Second, the court in *Masterson v. Federal Express Corporation*, No. 07-CV-2241, 2008 WL 5189342 (M.D. Pa. Dec.

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[11] The FLSA permits an employer to take the tip credit for some time that the tipped employee spends in duties related to the tipped occupation, even though such duties are not by themselves directed toward producing tips. For example, a waitperson who spends some time cleaning and setting tables, making coffee, and occasionally washing dishes or glasses is considered to be engaged in a tipped occupation even though these duties are not tip producing. However, where a tipped employee spends a substantial amount of time (in excess of 20 percent in the workweek) performing related duties, no tip credit may be taken for the time spent in such duties." [Exhibit 5, DOL Fact Sheet #15]. Notably, Koenig withdrew any claims related to whether she spent more than 20% of her workweek performing non-tip generating duties. [Exhibit 3, Koenig Dep. at pp. 4:11-6:13].

10, 2008), explicitly rejected Koenig's argument and held that the PMWA requires employers "to pay the applicable minimum wage for each workweek" such that a violation only occurs where total compensation is less than the product of the total number of hours worked and the statutory minimum hourly rate.[12] *Id.* at *1, 6 ("There is simply no explicit statement from the General Assembly that a standard other than the workweek is to applied to employees under the PMWA"). Therefore, the claim is inappropriate for class action treatment.

3. Koenig does not demonstrate the "manageability" of a class action because she fails to provide the Court with a "trial plan" demonstrating how the multiple allegations will be tried by common evidence.

"We believe that the pre-certification presentation of the aforementioned trial plans represents an advisable practice within the class action arena." *Wachtel ex rel. Jesse v. Guardian Life Ins. Co. of America*, 453 F.3d 179, 186 n.7 (3d Cir. 2006) (quoting approvingly to the advisory committee's note accompanying FED. R. CIV. P. 23 which states that "an increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible to class – wide proof"); *see also Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179, 192 (E.D. Pa 2007) ("In examining the manageability of the proposed class, two factors are considered: the manageability of the plaintiffs' proposed trial plan, and whether there are choice-of-law conflicts"). Koenig fails to provide a "trial plan" demonstrating how her claims will be demonstrated by common proof, despite the need for an individualized analysis as outlined above. [*See* Section IV.A.2]. Koenig's failure is particularly relevant because she presents multiple issues for certification. As such, Koenig fails to demonstrate that class treatment is the superior procedural mechanism, and thus class action treatment is inappropriate.[13]

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[12] In reaching its decision to adopt the "workweek standard," the *Masterson* court noted that "it is proper to give deference" to federal interpretations of the FLSA when interpreting the PMWA, and the FLSA follows the "workweek standard." *Masterson*, 2008 WL 5189342, at *3.

V. CONCLUSION

Cadillac Ranch requests the Court deny Koenig's motions for class and conditional collective action certification.

[13] Plaintiff prematurely discusses and argues the scope of judicial notice and the scope of the production of class data, among other things, in her motions. Cadillac Ranch respectfully requests that the Court defer any consideration of those issues at this time. Any discussion or argument about notice and class data is more appropriately had between the parties after the Court has decided the class and collective certification issues. As detailed extensively above, class or collective action treatment is unworkable in this case and, as such, Koenig's attempt to certify this case as a class or collective action must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of May 2017 a true and correct copy of the foregoing Defendant's Opposition to Plaintiff's Motion for Conditional and Class Certification was filed using the Western District of Pennsylvania's CM/ECF system, through which this document is available for viewing and downloading, causing a notice of electronic filing to be served upon the following counsel of record:

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